

109 FERC ¶ 61,197  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeene G. Kelly.

:

CenterPoint Energy Gas Transmission Company

Docket No. CP04-102-001

ORDER DENYING REHEARING

(Issued November 22, 2004)

1. In an order issued August 9, 2004, the Commission authorized CenterPoint Energy Gas Transmission Company (CenterPoint), under its Part 157 blanket certificate, to construct and operate a delivery tap in Sebastian County, Arkansas to deliver natural gas to the MacSteel Division of Quanex Corporation (MacSteel).<sup>1</sup> We found that the proposed facilities will be in the public convenience and necessity because they will provide MacSteel, which now receives gas from the local distribution company (LDC), with a direct connection to interstate natural gas supplies in a manner consistent with the Commission's policies encouraging competition.

2. On September 8, 2004, the LDC, Arkansas Oklahoma Gas Corporation (AOG) filed a timely request for rehearing of that order. For the reasons stated below, we are denying AOG's rehearing request.

**Background**

3. MacSteel currently receives the natural gas supplies used in its Sebastian County, Arkansas manufacturing operations from AOG's local distribution system; however, it has determined that it can lower its gas acquisition costs through a direct connection with CenterPoint and entered into an agreement with CenterPoint for the delivery of 3,500 Dth of natural gas per day, effective August 1, 2004. To accomplish delivery to MacSteel, CenterPoint proposed under the prior notice provisions of the Part 157 blanket certificate regulations to construct a delivery point off its existing Line BT-14.<sup>2</sup>

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<sup>1</sup> 108 FERC ¶ 61,180 (2004).

<sup>2</sup> The actual delivery point facilities consist of a 4-inch diameter tap, a flow control valve, 40-feet of 3-inch diameter pipeline, and a meter station.

4. Line BT-14 consists of approximately 129 miles of 12-inch pipe originally used for the transportation of oil, but which was converted to use for the transportation of natural gas. The Commission issued a certificate to CenterPoint (then known as Arkla Energy Resources) to acquire and operate the line for natural gas service in 1988.<sup>3</sup> After its acquisition, CenterPoint began service over the easternmost 106 miles of the line. Because CenterPoint has had no requests for service on an 11-mile segment on the western end of Line BT-14, that portion of the line has remained inactive up to this time.<sup>4</sup> The proposed delivery point would be located on that segment of Line BT-14. CenterPoint stated, however, that it has properly maintained the line in full compliance with U.S. Department of Transportation (DOT) regulations so that it would be available for service, and that it has obtained all necessary local, state, and federal permits for operation of the line segment. The line segment has at all times contained a blanket of nitrogen to protect the pipe. In 1996, CenterPoint, pursuant to DOT requirements, installed additional ground bed to enhance cathodic protection of the inactive segment.

5. AOG filed a protest to CenterPoint's prior notice filing to construct a delivery tap for MacSteel. AOG raised a number of issues regarding Line BT-14. It contended that CenterPoint cannot provide the proposed service because it has no authority to operate the 11-mile segment of Line BT-14 on which the delivery point would be located, either because CenterPoint did not satisfy a certificate condition that it commence service within 12 months after certification or, in the alternative, because CenterPoint has effectively abandoned the line through its non-use. AOG also claimed that CenterPoint no longer has an easement for its pipeline through the City of Barling because the 50-year easement granted to the original pipeline owner has expired. AOG argued as well that the Commission should prepare an environmental assessment addressing safety before it allows service on Line BT-14. AOG also argued that the new delivery point facilities and service would wastefully duplicate AOG's existing facilities and services and interfere with the regulation of state rates by the Arkansas Public Service Commission (PSC).

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<sup>3</sup> See Arkla Energy Resources, 44 FERC ¶ 61,020 (1988).

<sup>4</sup> When CenterPoint purchased the line in 1988, the western 23 miles of the line were inactive. In 1991, CenterPoint activated 11 of the 23 miles to install a tap to receive gas from an independent gas producer. Upon activation of the 11-mile segment involved here, one mile of Line BT-14 on the end of the line will remain inactive.

6. The Commission addressed each of these arguments in the August 9 Order. The Commission found that CenterPoint has a valid certificate to operate Line BT-14 without the need for any additional environmental review by the Commission. The August 9 order explained that regardless of the current status of the original pipeline easement, CenterPoint's certificate nonetheless entitles it to obtain an easement for its already existing pipeline either through negotiation or through the eminent domain process if negotiations fail to produce an agreement. The Commission also found that the proposed service was required by the public convenience and necessity, explaining that the proposal was in accordance with court-approved Commission policy to allow the bypass of LDCs by interstate pipelines where, as in this proceeding, there is no indication of anti-competitive or unduly discriminatory behavior.

### **AOG's Request for Rehearing**

7. In its rehearing request, AOG largely presents arguments the Commission already considered and rejected in the August 9 Order. AOG continues to assert that service through the involved 11-mile segment of Line BT-14 must be specifically authorized by the Commission as part of any overall delivery point project. AOG renews its earlier arguments that CenterPoint either never actually held certificate authorization to operate the 11-mile segment of Line BT-14 because it did not provide service over the segment within 12 months after receiving the certificate, or alternatively, that it let any such authorization lapse by effectively abandoning the line segment. AOG also continues to assert that CenterPoint no longer holds any easement to operate its pipeline over the portion of Line BT-14 running through the City of Barling.

8. On a new tack, AOG argues for the first time in this proceeding that the Commission should never have issued a certificate covering the 11-mile segment because the public convenience and necessity standard was not satisfied in 1988 for that portion of the line. AOG asserts that there was no demonstrated specific market for service over the particular segment, and the segment was not needed to carry out the purpose of the application in 1988.

9. AOG also continues to assert that activation of the 11-mile segment on Line BT-14 requires Commission environmental review, especially with respect to structures located on or very near the pipeline. AOG argues that the Commission's order improperly deferred safety matters to DOT, charging that the Commission has authority to impose requirements more stringent than DOT when warranted by "special circumstances," such as those that exist in this proceeding. AOG also contends that the Commission should have identified and considered alternative routes for service to MacSteel by CenterPoint.

10. With respect to the actual delivery point service, AOG contends that the Commission did not sufficiently address its claims that CenterPoint's service would result in a wasteful duplication of facilities, frustrate the ability of the Arkansas PSC to balance the interests of residential and industrial customers' interests, and potentially cause anticompetitive and unduly discriminatory cost subsidies.

11. Finally, AOG maintains that the Commission erred in not holding an evidentiary hearing to resolve material issues of fact and in accepting CenterPoint's answer to AOG's protest.

12. On September 23, 2004, CenterPoint filed a request for permission to file an answer to AOG's answer and its answer. We will allow CenterPoint's answer to the rehearing request so that we will have a complete record.

### **Commission Response**

#### **The Status of Line BT-14**

13. AOG raises on rehearing for the first time its argument that there was no demonstrated need for transfer of the 11-mile segment at the time the certificate was issued over 16 years ago. This amounts to an improper collateral attack on a long administratively final order. Accordingly, we will not further consider AOG's arguments in that area. Further, after considering AOG's other contentions regarding the 11-mile segment on Line BT-14, we affirm our earlier holding that CenterPoint holds a valid certificate to operate Line BT-14, including the 11-mile segment involved in this proceeding.

14. AOG, in effect, wants the Commission to divide the certificate authorization it issued in 1988. AOG continues to insist that CenterPoint did not perfect its certificate authority for the 11-mile segment within 12 months of receiving the certificate and thus, that the certificate is now invalid as to that portion of Line BT-14. We disagree. The 1988 Order issuing CenterPoint's certificate required that, "Pursuant to section 157.20(b) of the Commission's regulations ... acquisition shall be completed and service shall commence within 12 months from the date of this order."<sup>5</sup> In the August 9 Order, we found that CenterPoint had satisfied this condition by instituting service on Line BT-14 over more than 100 miles of the 129-mile line within the prescribed time.

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<sup>5</sup> See *Arkla Energy Resources*, 44 FERC ¶ 61,020 (1988), at p. 61,077.

15. The Commission has no bright line test as to what constitutes compliance with this standard certificate condition. The Commission regulation from which this certificate condition is derived, and to which the certificate condition refers, however, provides that, “any authorized ... acquisition shall be completed and made available for service by applicant ... for regular performance by applicant” within a period of time specified by the Commission in the order issuing the certificate.<sup>6</sup> As reflected in this language, it is the availability of service which is the Commission’s concern. The regulations provide further that, “With respect to an acquisition authorized by the certificate, applicant must file with the Commission, in writing and under oath ... the following: (1) Within 10 days after acquisition and the beginning of authorized operations, notice of the dates of acquisition and the beginning of operations.”<sup>7</sup> The pipeline provided the Commission with the appropriate notice, and as we explained in the August 9 Order, the pipeline began actual operations over a substantial portion of the line within the 12-month period. The remainder of the line, including the 11-mile segment, was ready and available for service. We are satisfied that the pipeline complied with both the letter and the intent of the certificate condition.

16. AOG contends that Commission precedent supports its contention that CenterPoint needs new certificate authorization to operate this portion of Line BT-14. We explained in the August 9 Order, however, that CenterPoint has not abandoned this 11-mile segment. CenterPoint has provided no service because, until now, it has had no customers for service using that portion of the pipeline.

17. The cases on which AOG relies to support its position, moreover, have no application to the situation before us here. In two Texas Eastern Transmission Corporation (Texas Eastern) cases cited by AOG, the pipeline requested abandonment in accordance with U.S. Environmental Protection Agency directives because the lines were contaminated with polychlorinated biphenyls (PCB’s). Noting that the abandoned lines could in the future be decontaminated and repaired, the Commission conditioned the abandonment certificates to require Texas Eastern to apply for new authorization under section 7(c) of the NGA if it should seek to operate the lines at a later date.<sup>8</sup>

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<sup>6</sup> See 18 C.F.R. § 157.20(b) (2004).

<sup>7</sup> See 18 C.F.R. § 157.20(d)(2) (2004).

<sup>8</sup> See *Texas Eastern Transmission Corporation, et al.*, 52 FERC ¶ 61,001 (1990) and *Texas Eastern Transmission Corporation, et al.*, 47 FERC ¶ 61,341 (1989).

18. In another proceeding cited by AOG, Columbia Gas Transmission Corporation (Columbia) requested possibly temporary abandonment of storage fields to accommodate coal mining operations. In approving the abandonments, the Commission noted that the potentially temporary nature of the abandonments did not relieve Columbia of the requirement that it request new certificate authority for any storage facilities it decided to reopen when coal mining activities had ended.<sup>9</sup> Unlike here, in the above-cited proceedings, the pipeline requested and was granted abandonment authority by the Commission.

19. In another case, Texas Eastern deactivated a line of pipe because of a gas leak, but did not request abandonment authorization from the Commission. When subsequently a shipper requested service through the line, the Commission ordered Texas Eastern either to activate the line or seek abandonment authority. Texas Eastern chose to activate the line. Because the reactivation of the line involved an expansion of the line's facilities, not simply a reopening of the line, Texas Eastern filed an application under section 7 of the NGA seeking certificate authority for its project.<sup>10</sup>

20. In none of these cases cited by AOG did the Commission require a pipeline to reapply for certificate authority simply because the line had not been used. Therefore, these cases have no precedential value here.

21. AOG states that the Commission should have followed the criteria set forth in its Certificate Policy Statement<sup>11</sup> in evaluating what AOG maintains is the relevant project – activation of the 11-mile segment on Line BT-14 and construction of the delivery point on that line segment. In this regard, it argues that the Commission should have assessed the effect of activating the 11-mile segment of Line BT-14 on landowners and CenterPoint's existing customers.

22. As we explained in the August 9 Order, because CenterPoint holds a valid certificate to operate Line BT-14, including the 11-mile segment, it needs no further approval from the Commission to provide service over the line. The only project before the Commission for consideration is the MacSteel delivery point on the existing,

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<sup>9</sup> See *Columbia Gas Transmission Corporation*, 71 FERC ¶ 61,077 (1995).

<sup>10</sup> See *Texas Eastern Transmission Corporation*, 81 FERC ¶ 61,245 (1997).

<sup>11</sup> *Certification of New Interstate Natural Gas Pipeline Facilities* (Policy Statement), 88 FERC ¶ 61,227 (1999); *order clarifying statement of policy*, 90 FERC ¶ 61,128 (2000); *order further clarifying statement of policy*, 92 FERC ¶ 61,094 (2000).

certificated Line BT-14. The Policy Statement, in any event, applies only to assessment of major new pipeline projects.<sup>12</sup> Here the only construction activity associated with activating service on the 11-mile segment of Line BT-14 is construction of a delivery tap for MacSteel. Consideration of the delivery point does not involve analysis under the Policy Statement because it is a minor activity permitted under CenterPoint's blanket certificate.

### **The City of Barling Easement**

23. On rehearing, AOG reiterates its argument that CenterPoint has lost its easement for the segment of Line BT-14 that runs through the City of Barling, Oklahoma. AOG again contends that CenterPoint allowed the lease for its pipeline easement to expire without participating in Barling's bidding process, and that CenterPoint has not satisfied the requirements to obtain the easement by eminent domain because it did not negotiate with the City of Barling in good faith. Without an easement, suggests AOG, CenterPoint cannot operate its pipeline.

24. We addressed this issue fully in our August 9 Order. We explained that the issuance of a certificate for pipeline facilities by the Commission also confers a right under section 7(h) of the NGA to an easement for that pipeline. Here, the Commission has issued CenterPoint a certificate to operate Line BT-14, including the portion that runs through the City of Barling. We have held that the certificate is valid, and that CenterPoint has a right to operate its pipeline. The pipeline and the necessary right-of-way for the pipeline already exist. Because the prior lease for the pipeline easement has expired, however, a new agreement for the pipeline easement is necessary. If the parties cannot reach agreement, the court will decide issues relating to eminent domain and compensation under state law.<sup>13</sup> Whether the parties have negotiated in good faith is an issue for the court, not this Commission. In any event, however, as we explained in the August 9 Order, the transaction between the City of Barling and AOG does not affect CenterPoint's right to an easement for its existing Line BT-14 facilities.

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<sup>12</sup> *Id.*, 88 FERC ¶ 61,227, at p. 61,745.

<sup>13</sup> AOG suggests in its rehearing request that a U.S. District Court has found that CenterPoint has lost its easement to AOG. This mischaracterizes the court's ruling. In fact, as we noted in the August 9 order, the court merely denied CenterPoint's motion for preliminary injunctive relief, *i.e.*, immediate possession, and reserved further action until the Commission resolves issues relating to the regulatory status of the line. *See CenterPoint Energy Gas Transmission Company v. 3.79 Acres of Land*, No. 04-2099, slip op. (W.D. Arkansas May 12, 2004).

**Bypass of AOG's Facilities**

25. AOG contends that the August 9 Order did not contain any meaningful analysis regarding the impact of the new CenterPoint delivery service on AOG's own operations or on Arkansas state rates. We disagree. The August 9 Order set out in detail the Commission's policy and explained its application to the present situation. We stated that in furtherance of the Commission's policy that competition benefits consumers by encouraging improved service at lower rates, we generally permit interstate pipelines to bypass LDCs and provide direct service to end-users so long as there is no indication of anticompetitive or unduly discriminative behavior.

26. AOG, however, renews its contention that the proposal would result in wasteful duplication of AOG's existing facilities. AOG argues that CenterPoint's service will not benefit MacSteel because AOG has provided it with a special low rate. MacSteel, however, has decided that it is in its best interest to purchase service directly from CenterPoint rather than from the LDC, even though MacSteel will need to construct its own connecting pipeline to do so. As we explained in the August 9 Order, the Commission does not second guess an end-user's determination that it will benefit economically from a service. It is reasonable for MacSteel to conclude that it will benefit from the opportunity to choose between competing services. Thus, we affirm our earlier finding that the new facilities will not be wasteful, even though service is already available from AOG.

27. AOG contends that we did not properly examine the impact of CenterPoint's delivery service on Arkansas intrastate transportation rates. The impact is particularly great here, argues AOG, because the potential loss of such a large customer as MacSteel would make it necessary for AOG to file a rate case with the Arkansas PSC seeking an increase in rates for its remaining customers. AOG states that the Arkansas PSC authorizes higher intrastate rates for industrial customers in order to subsidize residential customers, and it renews its earlier contention that the Arkansas PSC is in a better position than this Commission to address what are essentially competing local concerns.

28. The August 9 Order addressed this matter. We explained that any rate implications for AOG's local distribution service from a loss of MacSteel's business are the province of the Arkansas PSC, which can address any issues relating to the potential for cost-shifting on AOG's local distribution system.

29. AOG contends that CenterPoint's proposal does not contain sufficient documentation for a conclusion that the bypass will not result in anticompetitive or unduly discriminatory behavior. CenterPoint has not stated the cost involved in activating the 11-mile segment of Line BT-14 or who would bear those costs, avers



AOG, and thus has not shown that it is economically feasible for CenterPoint to provide the proposed service to MacSteel without anticompetitive or unduly discriminatory cross subsidies by existing customers. AOG asserts that Commission precedent requires that MacSteel pay these costs, not CenterPoint's other rate paying customers.

30. In *PECO Energy Company v. Texas Eastern Transmission Corporation*,<sup>14</sup> the Commission proceeding on which AOG bases its position, a customer requested Texas Eastern to provide gas service through two new delivery points to be constructed on an idle line segment that, like the line at issue here, had been filled with nitrogen. The customer was willing to pay for the delivery points, but not for reactivating the idle line. Because the customer was requesting that the line be reactivated for the limited purpose of serving only the single customer, the Commission found that the customer should pay the costs associated with reactivating the line.

31. While the facts in the *PECO* proceeding are similar to the situation before us, there is a significant difference. In *PECO*, the question was whether the pipeline system customers should pay for the reactivation through their rates. The Policy Statement states that there is a presumption supporting rolled-in rate treatment for the costs of eligible facilities constructed under a pipeline's Part 157 blanket certificate. That presumption, however, will not apply to any costs associated with activating service on the 11-mile segment of Line BT-14, if CenterPoint seeks permission to include those costs in its rates in its next rate proceeding. CenterPoint has not indicated that it will seek rolled-in treatment for these reactivation costs in its next rate proceeding, and it has not asked the Commission to make a preliminary finding on that issue here. We affirm our earlier finding that there is no evidence that CenterPoint's proposal is the result of any anti-competitive or unduly discriminatory behavior.

### **Environment**

32. AOG's allegations that the Commission did not perform adequate environmental and safety review of the 11-mile Line BT-14 segment is premised on its contention that CenterPoint's institution of service on that line segment should be considered part of an overall project requiring approval by the Commission. AOG argues that the Commission has artificially divided a major project into smaller segments, thereby trying to evade its responsibilities under NEPA. As we have explained above, this is not so. CenterPoint's request for authority to construct a delivery point on Line BT-14 is a discrete project, conceived many years after CenterPoint acquired Line BT-14. CenterPoint has not requested authority from the Commission to operate the 11-mile segment, and we have found that CenterPoint needs no further approval from the Commission to operate its line.

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<sup>14</sup> 77 FERC ¶ 61,067 (1996).

Thus, as we explained in the August 9 Order, there are no environmental or safety issues relating to the operation of Line BT-14 for the Commission to consider in this application proceeding. We also explained that any safety issues related to this existing segment of Line BT-14 are exclusively the responsibility of DOT,<sup>15</sup> and that if AOG believes that CenterPoint is not in compliance with its safety regulations, it can bring those concerns to DOT's attention.<sup>16</sup>

33. CenterPoint properly filed its application to construct a delivery tap on Line BT-14 under the Commission's prior notice procedures for minor or routine construction projects,<sup>17</sup> and CenterPoint submitted the environmental information pertinent to such applications.<sup>18</sup> The Commission stated that the proposed delivery point qualified under the Commission's regulations as a categorical exclusion from the requirements for more detailed environmental analysis.<sup>19</sup> The Commission's staff performed a review which confirmed that the proposed delivery tap qualifies as a categorical exclusion.

### **Procedural Arguments**

34. Finally, AOG contends, with no supporting argument, that the Commission erred in denying its request for an evidentiary hearing and in accepting CenterPoint's answer to AOG's protest. AOG also suggests that the Commission improperly granted a request by MacSteel to intervene in the proceeding nearly three weeks after the due date for intervention requests. We fully addressed these allegations in the August 9 Order. We

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<sup>15</sup> The August 9 order described CenterPoint's measures to protect the safety and integrity of the line segment, and its certification that it will comply with DOT's safety program in the future.

<sup>16</sup> AOG asserts that DOT and the Commission have agreed that in special circumstances, which it argues exist here, the Commission may impose safety conditions more stringent than DOT standards. The agreements to which AOG refers and the special circumstances involved in those agreements relate solely to approval and siting of liquefied natural gas (LNG) facilities under section 3 of the NGA. The agreements have no pertinence to the situation before us in this proceeding involving an already existing pipeline. *See Sound Energy Solutions*, 107 FERC ¶ 61,263 (2004), at P 76.

<sup>17</sup> 18 C.F.R. § 157.211 (2004).

<sup>18</sup> 18 C.F.R. § 157.206(b) (2004).

<sup>19</sup> 18 C.F.R. § 380.4(a)(21) (2004).

explained that an evidentiary, trial-type hearing is necessary only where there are material issues of fact in dispute that cannot be resolved on the basis of the written record, and that AOG had not raised a material issue of fact that could not be resolved on the basis of the written record. As to AOG's assertion that we improperly admitted an answer to AOG's protest, we explained that, while answers to protests are generally not permitted under our rules of procedure, those rules also provide that the Commission may waive its procedural rules for good cause. We found good cause in this situation so that we would have all the issues in this proceeding before us. We also explained that MacSteel's intervention was timely filed in accordance with the Commission's rules and the published notice of the application.<sup>20</sup>

### **MacSteel's Connecting Pipeline**

35. In its rehearing request, AOG states that an Arkansas state court has invalidated an easement granted by Sebastian County, Arkansas for MacSteel to construct a 2-mile long pipeline connecting its plant with the proposed CenterPoint delivery point. On the grounds that MacSteel does not hold a valid easement to connect its plant with the CenterPoint pipeline, AOG argues that no purpose would be served by granting CenterPoint the requested certificate authorization. AOG stated that it would supply the Commission with a copy of the court's order as soon as it was issued. On October 4, 2004, AOG submitted a copy of the court's order,<sup>21</sup> along with a cover letter presenting argument regarding the effect of that order.

36. On October 19, 2004, CenterPoint filed a motion to strike the cover letter submitted with the court's order as an untimely supplement to AOG's request for rehearing. AOG replied to the motion to strike on October 29, 2004. We will accept AOG's October 4, 2004 filing, including the cover letter, into the record because doing so will not unduly delay this proceeding and it will ensure a complete record upon which the Commission can base its decision.

37. The Arkansas court found that Arkansas statutory procedures had not been followed in the award of the easement, and declared the grant of the easement null and void. Although CenterPoint does not specifically say so in its answer or its motion, the

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<sup>20</sup> We note that, even had the intervention request been late, the Commission often allows late intervention by interested parties.

<sup>21</sup> See *Arkansas Oklahoma Gas Corporation v. Parnell Consultants, et al.*, No. CV-2003-418-G, slip op. (Cir. Ct. of Sebastian County, Arkansas, Greenwood District, Division V September 8, 2004).

fact that CenterPoint has filed an answer to the rehearing request and a motion to strike material recently submitted by AOG, strongly suggests that CenterPoint and MacSteel will continue to pursue their options in connecting CenterPoint's pipeline system to MacSteel's plant. Therefore, we affirm our finding that it is in the public interest to grant authorization for CenterPoint to proceed with constructing a delivery tap to serve MacSteel.

The Commission orders:

(A) AOG's request for rehearing is denied.

(B) CenterPoint's motion to strike is denied.

By the Commission.

( S E A L )

Linda Mitry,  
Deputy Secretary.